VIJENDRAN PONNIAH

v.

MBF COUNTRY HOMES & RESORTS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUMMONS NO: S2(S1)-23-16-1996]
12 NOVEMBER 2001

CIVIL PROCEDURE: *Abuse of process - Malicious institution of proceedings - Whether bankruptcy proceedings ought not to have been instituted against plaintiff - Whether there was evidence of malice - Whether abuse of process proved*

This was a claim by the plaintiff for damages due to civil malicious prosecution arising out of bankruptcy proceedings instituted against him by the defendants (who had earlier obtained judgment in default of appearance against the plaintiff), and for abuse of process.

Held:

[1] The judgment in default of appearance (default judgment) was never served on the plaintiff, thus giving him no opportunity to set it aside. Therefore, the default judgment had not crystallised into a final judgment and bankruptcy proceedings ought not to have been commenced against the plaintiff. (p 165 e-f)

[1a] Evidence of malice can be construed from the utter recklessness or failure to make proper and adequate enquiries, or from not making any effort to test information or grounds of suspicion for veracity. Based on the aforesaid principles, there was malice on the part of the first defendant; as regards the second defendant, the lack of care on its part was sufficient to constitute malice. (pp 167 a-b & h)

[2] There was no proper commercial purpose to be served by seeking the plaintiff's bankruptcy and the distribution of his assets. Consequently, the bankruptcy proceedings were an abuse of process commenced and maintained to effect an object not within the scope of the process thereby causing the plaintiff damages. In continuing with the bankruptcy proceedings, the defendants had acted unlawfully, negligently and unconscionably with conscious wrongdoing in contumelious disregard for the plaintiff's rights. (p 169 f-g)

[3] For civil malicious prosecution, the plaintiff is awarded RM200,000 for general damages, and RM100,000 for aggravated damages, against both defendants. For abuse of process, the plaintiff is awarded RM100,000 against both defendants. (pp 171 d, h & 172 a)

[Order accordingly.]

Case(s) referred to:

Adzmi Ali & Anor v. Mohamed Isa Kasad [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 ***(refd)***

Bahori Lal & Anor v. Sri Ram & Anor AIR (33) [1946] Allahabad 139 ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 ***(foll)***

Fitzjohn v. MacKinder CXLII ER 199 ***(refd)***

Johnson v. Emerson and Sparrow [1871] LTR XXV 337 ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 ***(refd)***

Mohamed Amin v. Jogendra Kumar Bannerjee & Ors AIR (34) [1947] 108 ***(refd)***

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 ***(dist)***

Premji Damodar v. LV Govindji & Co AIR (34) [1947] Sind 169 ***(refd)***

Re Aris Massod ex p UOL Factoring Sdn Bhd [1998] 4 CLJ Supp 446 ***(refd)***

Re Udos Riging ex p Seabanc Kredit Sdn Bhd [1994] 3 MLJ 383 ***(refd)***

Rohani Nor v. Sincere Leasing Sdn Bhd [1993] 1 AMR 225 ***(refd)***

Shearer v. Shields [1914] AC 808 ***(refd)***

SMT SR Venkataraman v. Union of India & Anor AIR [1979] 49 ***(refd)***

Vijendran Ponniah v. Bank of Commerce [1999] 5 CLJ 69 ***(dist)***

Williams v. Spautz [1992] 174 CLR 509 ***(refd)***

Legislation referred to:

Bankruptcy Rules 1969, rr. 95, 98

Legal Profession (Practice and Etiquette) Rules 1978, r. 56

For the plaintiff - Joginder Singh (Murali Achan); M/s Vijendran & Co
For the 1st defendant - Teh Beng Boon; M/s Heng & Mogan
For the 2nd defendant - Trevor George De Silva; M/s Shook Lin & Bok

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

Facts

The plaintiff is an advocate and solicitor and was at all material times the sole proprietor of his legal firm. The plaintiff's firm prepared a facilities agreement for the 1st defendant for which a bill dated 4 August 1986 for the sum of RM15,000 was delivered to the 1st defendant. The plaintiff's firm also prepared a loan agreement for the 1st defendant's holding company MBf

Holdings for which a bill for RM31,250 was delivered to MBf Holdings. The two bills were not denied and/or disputed; neither did the 1st defendant or MBf Holdings pay the plaintiff on his said bills.

The plaintiff was a holder of a credit card from the 1st defendant and as at 29 March 1988 there was a sum of RM7,519.44 due on the credit card. To the 1st defendant's previous solicitors' notice of demand dated 29 March 1988 claiming the sum of RM7,519.44 the plaintiff by his letter dated 6 April 1988 referred to his said unpaid bills and denied owing the 1st defendant the sum of RM7,519.44. The plaintiff further demanded payment on his bills which far exceeded the sum of RM7,519.44. The 1st defendant again did not dispute the plaintiff's claim or reply to the plaintiff's letter. The plaintiff, at the request of the 1st defendant's previous solicitors, again forwarded the bill with a letter dated 26 May 1988. There was no reply to this letter too. The 1st defendant, however, without serving the Kuala Lumpur Magistrate's Court Summons No. 82-4065-88 (the summons) on the plaintiff, proceeded to obtain judgment in default of appearance for the sum of RM7,519.44. Although the fact that the plaintiff was represented by solicitors was known to the 1st defendant's previous solicitors, no notice was given to the plaintiff under r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978. The summons was issued on 23 April 1988 and judgment in default of appearance (the default judgment) was obtained on 28 June 1988.

Having obtained the default judgment the 1st defendant withheld execution proceedings for about four and a half years until it commenced bankruptcy proceedings against the plaintiff on 1 December 1992. No explanation was offered for withholding execution proceedings. The 2nd defendant, the solicitors for the 1st defendant, received instructions from the 1st defendant along with a copy of the judgment, all other relevant documents, demand letters and cause papers, to institute bankruptcy proceedings against the plaintiff. The defendants continued with bankruptcy proceedings up to the point of publishing the issuance of creditor's petition, in The Star newspaper.

On reading the advertisement of the creditor's petition in the local newspaper, the plaintiff applied to set aside the service of the summons. On a preliminary issue that the summons was never served on the plaintiff, the learned Magistrate set aside the service of the summons on 22 August 1995. Consequently, the judgment in default was also set aside. The 1st defendant did not appeal against the decision of the learned Magistrate. Neither did the 1st defendant commence a fresh action against the plaintiff. It must be noted that the creditor's petition was also posted on the notice board of the High Court at Kuala Lumpur. The plaintiff successfully set aside the service of the bankruptcy notice and had the creditor's petition struck out on 16 November 1995.

The Plaintiff's Claim

The plaintiff's claim is for damages for civil malicious prosecution arising out of the bankruptcy proceedings, and for abuse of process.

Findings Of The Court

(A) Civil Malicious Prosecution

With regard to the claim for civil malicious prosecution the plaintiff has to satisfy the court on the following issues.

1. Did The Defendants Have A Right To Institute Bankruptcy Proceedings?

> The foundation of the action lies in abuse of the process of the Court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose.

said Sir John Beaumont in *Mohamed Amin v. Jogendra Kumar Bannerjee and Others* AIR (34) [1947] 108 at 112 (PC). This case also held that in order to succeed the plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, and that they terminated in his favour and that he had suffered damage, and that the damage claimed is for damages to the person, to property or to reputation. Sir John went on to say at the same page as follows:

> … That the word 'prosecution' in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company ...

In *Bahori Lal & Anor v. Sri Ram & Anor* AIR (33) [1946] Allahabad 139 the court held that the mere presentation of the petition for insolvency would tend to injure the credit and the reputation of the persons proceeded against in the society in which they move, much more so if they are actually adjudged insolvents and their property is seized by the receiver and the adjudication is annulled on appeal. The person so proceeded against is entitled to sue in tort for damages if the application for insolvency is malicious and without a reasonable and probable cause. It is immaterial whether he was a trader or not.

As a general rule, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even though malice is provable. The recognised exceptions to this general rule are in the case of proceedings for bankruptcy, liquidation, arrest and execution against property instituted maliciously and without reasonable and probable cause. The principles applicable in all these excepted cases are the same as in actions for malicious prosecution for the institution of criminal proceedings. (See *Premji Damodar*

v. LV Govindji & Co AIR (34) [1947] Sind 169.) Therefore it is obvious that the principles applicable to civil malicious prosecution of bankruptcy proceedings are the same as in actions for malicious prosecution for the institution of criminal proceedings.

The facts of the case before me reveal that the judgment in default against the plaintiff was obtained without service of the summons on the plaintiff because, on a preliminary issue raised that the summons was never served on the plaintiff, the Magistrate Court set aside the service of the summons and consequently the judgment in default was also set aside. Since the 1st defendant neither appealed against that decision nor elected to file a fresh action as it was entitled to do since the case was only disposed off, on a preliminary issue, there was no judgment to form the linch-pin for the bankruptcy proceedings.

(a) The Bankruptcy Proceedings

The entire bankruptcy proceedings were riddled with incurable irregularities:

(i) The judgment upon which bankruptcy proceedings were instituted was a nullity.

(ii) The Request for Issue of Bankruptcy Notice stated that the plaintiff resided at his office, which was purportedly his last known address. The contractual address for service or the last known address of the plaintiff was his home address, namely, 97 Jalan Lee Woon, Zoo View, Ulu Klang 68000 Selangor and not the plaintiff's office which is in Kuala Lumpur.

(iii) The bankruptcy notice which was extended for nine months from 28 February 1993, expired on 30 November 1993. This bankruptcy notice was never served whether by personal service or by substituted service within this period, resulting in the demise of the bankruptcy notice and the order for substituted service. This fact was not revealed to the court.

(iv) The defendants applied *ex parte* on 24 December 1993 to extend the life of the 'dead' bankruptcy notice and obtained the order dated 28 December 1993 purportedly for nine months. No order was made for the substituted service of the purported extended bankruptcy notice. Again these facts were not revealed to the court.

(v) The defendants purportedly enforced a non-existent order for substituted service of a non-existent bankruptcy notice on the plaintiff on 28 February 1994. This fact too was not revealed to the court.

(vi) The orders for extension of the bankruptcy notice dated 31 March 1993 and 28 December 1993 respectively, and the order for substituted service of the bankruptcy notice were obtained by misleading the court in that the affidavits filed in support of the applications contained misleading averments.

(vii) The affidavit of non-service affirmed alleged that all reasonable efforts were made to serve the bankruptcy notice whereas in fact no letter of appointment was sent to the plaintiff to enable the plaintiff to make himself available so that service could be effected.

(viii) The affidavit in support of the application for substituted service of the bankruptcy notice affirmed alleged that the plaintiff was evading service of the bankruptcy notice when in fact his solicitors had written a letter dated 10 December 1992 to the 2nd defendant.

(ix) The bankruptcy notice was never served on the plaintiff. In fact the defendants never had a bankruptcy notice to serve the plaintiff.

(x) There was no act of bankruptcy committed by the plaintiff.

(xi) The defendants, without a bankruptcy notice and without an act of bankruptcy issued out the creditor's petition in contravention of the Bankruptcy Act 1967.

(xii) The defendants misled the court into granting the order for substituted service of the creditor's petition, in that:

(a) the calls were not made at the plaintiff's address of service, namely, the plaintiff's residence;

(b) the letter of appointment purportedly sent to the plaintiff was not sent to his last known address, namely, the plaintiff's residence;

(c) the plaintiff did not receive the purported letter of appointment;

(d) the letter of appointment purportedly sent to the plaintiff came from the agent Sejana Services Sdn Bhd and not from the 2nd defendant; and

(e) no enquiries were made by the process server with regard to the plaintiff.

In fact it is appropriate at this stage to remind creditors and their solicitors of the dire warning given by Mahadev Shankar J (as he then was) in *Rohani @ Hamidah bt Nor v. Sincere Leasing Sdn Bhd* [1993] 1 AMR 225 when he said at p. 766:

> … Bankruptcy proceedings are penal in nature and judgment creditors and their solicitors will be well advised to take note of their responsibility more seriously.

(b) Can The Defendants Claim They Were Acting On A Valid Judgment?

The defence of both the defendants and their evidence in court was that they were not without reasonable and probable cause, to institute bankruptcy proceedings on the sole ground that they had a valid judgment at the material time of filing the said bankruptcy proceedings. The 2nd defendant's additional defence was that it acted on the instructions of the 1st defendant.

In *Fitzjohn v. MacKinder* CXLII ER 199 Cockburn LJ in addressing this very same issue said at p. 208 as follows:

> … the defendant, in order to avoid the consequences of a proceeding on the face of it otherwise clearly wrongful and actionable, seeks to protect himself by shewing that he acted under the order of the county court judge. … it is not competent to the defendant to shelter himself under this order, seeing that the judge was induced to make it through his perjury and fraud. To suffer the judge to make such an order without informing him of the truth, and disabusing his mind of the error into which he had been led by wilful falsehood, was, as it seems to me, a fraud upon the judge, as well as a wrongful act towards the plaintiff: and I cannot bring myself to think that the defendant should be allowed to shelter himself under an order having its origin in his own falsehood, and issuing through his own fraud.

I have enumerated all the various misgivings and mistakes committed by the defendants with respect to the obtaining of the judgment based on which the defendants commenced the bankruptcy proceedings. I cannot accept that under our law which ensures that no wrong can exist without a remedy, a litigant such as the plaintiff can be denied redress in the face of so blatant a wrong, on the ostensible ground that the defendants who had so flagrantly abused the process of the court by improperly obtaining a judgment could attempt to benefit from such iniquitous conduct on the sole basis that they were acting upon such an order of the court obtained improperly, which certainly no Magistrate or judge would have granted, if appraised of the true circumstances. As for the 2nd defendant whose additional ground was that they acted on instructions, surely it was their duty to have verified the validity of the order upon which they were asked to act.

(c) Concealment Of Material Facts

The default judgment, the bankruptcy notice, the extensions of the bankruptcy notice, the orders for substituted service of the bankruptcy notice and the creditor's petition, were obtained by the concealment of material facts. Had the courts known the true facts the various orders obtained by the defendants would never have been granted. The default judgment was obtained by concealing from the court material evidence without which the court would not have granted default judgment.

(i) The judgment was obtained in default of appearance of the plaintiff on the return date and it was alleged that the plaintiff did not appear despite being served with the summons. The court was required to rely on the truthfulness of the affidavit of service and on the honesty of counsel appearing and seeking the order for default judgment.

(ii) The summons was however never served on the plaintiff and this fact was concealed from the court.

(iii) There was no evidence of service of the summons. This fact was not revealed to the court.

(iv) There was no endorsement of the service of the summons. This fact too was not revealed to the court. The affidavit of service on the contrary positively affirmed an endorsement when there was none.

(v) The evidence of the plaintiff in respect of the aforesaid matters was never challenged. The 1st defendant's then solicitors were not called to rebut this evidence. The defendants offered no explanation either.

In *Chee Pok Choy & 4 Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321 the Court of Appeal set out the law on the impeachment of a judgment obtained by concealment of material facts.

The Court of Appeal in what it regarded as an exceptional case examined the undisputed facts of the case beginning with the cause papers including the affidavit filed by the respondent. The court found that no where in the affidavit was there any mention of the fact that the respondent was a moneylender. The respondent was held to have actively concealed that fact. The court further held that had the respondent not concealed the truth from the court when it obtained the foreclosure order, namely, that it was a licensed moneylender, its action would have been struck out. The respondent had therefore obtained the foreclosure order by fraud. The Court of Appeal took the view that the appellant's evidence was not subject to any serious challenge. In fact, much, if not all, of the evidence relied upon in support of the allegation of fraud was made up of the respondent's own documents.

(d) Failure Of The Defendants To Comply With Practice Direction 1 Of 1968

To avoid repetition I do not intend to reproduce the said lengthy Practice Note which has been reproduced in full in *Re Aris bin Massod: Ex Parte UOL Factoring Sdn Bhd* [1998] 4 CLJ Supp 446. This Practice Direction sets out the procedure for substituted service in respect of bankruptcy proceedings since neither the Bankruptcy Act nor the Bankruptcy Rules set out the procedure. Practice Direction 1/68 states that in such cases an application must be made to the High Court and it also sets out the number of calls to be made and

that the said calls should be made at the defendant's residence, permanent or temporary, or if the claim relates to the defendant's business at his business address. In the case before me there was clearly non-compliance of this direction.

(e) On A Default Judgment That Was Not A Final Judgment

In *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383, Abdul Kadir Sulaiman J (as he then was) held that under r. 95 of the Bankruptcy Rules 1969, a bankruptcy notice is to issue only on a final judgment or order where executions had not been stayed and he went on to hold that for the purpose of bankruptcy proceedings, a default judgment is not final because it had not been decided on its merits and any judgment not given on merits is liable to be set aside on application and does not finally dispose of the rights of the parties. His Lordship went on to hold that if the debtor had not appealed within time, the default judgment would have crystallised into a final judgment. However, in that case, the debtor had filed his application to set aside the default judgment within time and the court held that the judgment would only be final after he had exhausted his remedy given by law. The issue of a stay of execution would only be relevant if the default judgment was final. Therefore, pursuant to r. 98 of the Bankruptcy Rules 1969, his Lordship held that no act of bankruptcy had been committed by the debtor under the notice. I agree with the views expressed by the learned judge. In the case before me the default judgment was never served on the plaintiff, thus giving him no opportunity to set it aside. It is my judgment therefore that the default judgment in this case had not crystallised into a final judgment and that bankruptcy proceedings ought not to have been commenced against the plaintiff.

The 1st defendant relied heavily on the Supreme Court decision in *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 to argue that a default judgment is a good and enforceable judgment until set aside and that therefore on that basis the 1st defendant was entitled to proceed with the bankruptcy proceedings. The facts of the case in *Pembinaan KSY* are peculiar to the decision of the Supreme Court. The appellant company were the contractors to the respondent company for a development project of property owned by the respondent company. The balance of payment for work on the development project was due to the appellant company and they obtained a default judgment against the respondent company. In the meantime a petition for winding-up of the respondent company had been presented by the Morgan Guarantee Trust Co. The appellant company supported the petition as supporting creditor. The respondent company filed a notice to strike out the appellant company as a supporting creditor on the grounds that it had no *locus standi* to support the petition. The learned

trial judge gave judgment for the respondent company as he held that the default judgment was null and void and should be set aside. The appellant company appealed. In allowing the appeal the Supreme Court held that the default judgment, until set aside was a good and enforceable judgment and that the appellant company was perfectly entitled to rely on the default judgment as a basis for its right to be a supporting creditor and should be recognised in the petition as a supporting creditor.

It is obvious therefore from the facts in *Pembinaan KSY* that there was no element of concealment of material facts, breach of a rule and malice, well within the knowledge of the defendants themselves to taint the in default judgment. In the case before me, the defendants clearly and unambiguously concede that the summons was not even served on the plaintiff. How then could they obtain a valid judgment against the plaintiff for this court to even consider the effect of the decision of the Supreme Court in *Adzmi b. Ali & Anor v. Mohamed Isa bin Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37. On the other hand, even if the defendants were to contend that upon the admission of the plaintiff that he owed the 1st defendant the sum claimed in the bankruptcy proceedings, the 1st defendant had failed to deny or reject the bill of the plaintiff to the 1st defendant which was a sum in excess of that claimed by the 1st defendant and in which case, if the 1st defendant had through the 2nd defendant served its summons on the plaintiff, the plaintiff would have claimed a set off or would have counterclaimed. So the mere existence of the debt from the plaintiff to the 1st defendant does not, by itself provide a defence to the plaintiff's claims.

(f) Malice

In *SMT. S.R. Venkataraman v. Union of India & Anor* AIR [1979] SC 49 the Supreme Court of India relied on Viscount Haldane's description of malice as stated in *Shearer v. Shields* [1914] AC 808 at p. 813 which reads as follows:

> A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.

The Supreme Court of India then proceeded to give its own views on malice at p. 51:

> Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

It is my judgment that where it is plain that there is a want of a reasonable or probable cause or excuse, it is reasonable to conclude that the defendant could not honestly have believed in the charge he made and this in my view is evidence of malice. I further hold that evidence of malice can be construed from utter recklessness or failure to make proper and adequate enquiries, or not making any effort to test one's information or grounds of suspicion, for veracity. Applying these distilled principles I can see malice scorching its way through this case. The 1st defendant was malicious in:

(a) proceeding with the summons and obtaining default judgment without replying to the plaintiff's letters and/or denying the plaintiff's claims;

(b) having requested the plaintiff for his bill for RM15,000 and having received the bill, proceeding to obtain default judgment;

(c) not making any request for payment on the default judgment before instituting and continuing with bankruptcy proceedings; and

(d) withholding execution proceedings for four and a half years before instituting bankruptcy proceedings.

The 2nd defendant has specifically denied any malice in instituting the bankruptcy proceedings and the defence is that they had a reasonable and probable cause for instituting the same, without malice and in the *bona fide* belief that they were discharging their duty as solicitors for the 1st defendant. Basically the 2nd defendant's defence is similar to that of the 1st defendant in that there was a valid judgment subsisting at the time the bankruptcy proceedings were instituted. To avoid repetition, I hold that my judgment on this issue is as found against the 1st defendant. As for merely taking instructions, I am of the view that since the 2nd defendant as solicitors was embarking on execution proceedings it was its incumbent duty to have ascertained the validity of that very judgment that was to form the prop to support the bankruptcy proceedings. And in order to exercise that duty the 2nd defendant was clearly expected to check and verify if that judgment was indeed well founded, unimpeachable and was not even the subject of an appeal. The very fact that the judgment was an in default judgment should have put the 2nd defendant to a high degree of alertness as to whether there was proper service of the summons. A search of the court file would have clearly shown the absence of an affidavit of service. To my mind the lack of care on the part of the 2nd defendant was sufficient to constitute malice. It is apropos that I cite a passage from *Johnson v. Emerson and Sparrow* [1871] LTR XXV 337 wherein Baron Martin said as follows at p. 352:

> … I quite agree that if an attorney, knowing a proceeding in bankruptcy to be groundless, presented a petition, either from the motive of gain to himself, or in obedience to the instruction of an oppressive and vindictive client, it would be in law a malicious act.

I was referred to another case, namely, *Vijendran Ponniah v. Bank of Commerce* [1999] 5 CLJ 69 wherein on the very same cause of action and on almost similar facts and brought by the very same plaintiff, my learned brother James Foong J in dismissing the action held:

> A judgment sum stands as a good judgment until set aside. When a judgment sum is not paid, then execution can be enforced. This can take the form of a bankruptcy proceeding. Therefore, there was no sinister reason behind the approach taken by the defendant to commence the bankruptcy proceedings.

Whilst I agree with that view, the facts before me are totally different. Here the defendants knew that the judgment taken was improper and illegal because the summons had not even been served on the plaintiff. This very material fact distinguishes the two cases. Having considered the matter in its entirety I find that the plaintiff had indeed proved his case for civil malicious prosecution against the defendants.

(B) Abuse Of Process

To succeed in a claim for damages for the tort of collateral abuse of process, a claimant need not prove that the party claimed against, had maliciously invoked the process of court, or that the proceedings had terminated in the claimant's favour. The claimant, however, would have to prove that the process complained of had been initiated by the party claimed against, and that the process was initiated for a purpose other than to obtain a genuine redress, and that the claimant had suffered some damage or injury in consequence thereof. (See *Malaysia Building Society Berhad v. Tan Sri General Ungku Nazaruddin b. Ungku Mohamed* [1998] 2 CLJ 340.) The essence of an abuse of process action is that the proceedings complained of were instituted and/or maintained for a purpose other than that for which they were properly designed or exist, or to achieve for the person instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process. The focus in such a suit is on the purpose for which the proceedings exist, and on the dominant purpose of the person charged with abuse of process in instituting them. It is my judgment that if the court is satisfied that the plaintiff has shown that there was want of reasonable and probable cause for instituting and/or for continuing with bankruptcy proceedings the court must presume that the defendants instituted and continued with bankruptcy proceedings for a purpose other than that for which bankruptcy proceedings were properly designed or exist. It is not necessary

for the plaintiff to show what that purpose was or to identify the collateral object. If the court is satisfied that in continuing with bankruptcy proceedings, the defendants acted unlawfully, negligently, unconscionably, with conscious wrongdoing in contumelious disregard for the plaintiff's rights, the plaintiff must succeed in his cause of action for abuse of process. If however the court is not satisfied that there was want of reasonable and probable cause, the plaintiff must prove that the defendants instituted and/or continued with bankruptcy proceedings for one or all of the following purposes, namely:

(a) for a purpose other than that for which bankruptcy proceedings were properly designed or exist;

(b) to achieve for the defendants some collateral advantage beyond that which the law offers; or

(c) to exert pressure on the plaintiff to effect an object not within the scope of the process.

The fundamental purposes of bankruptcy proceedings are to recover a debt for which the plaintiff is lawfully entitled to and to distribute the assets of the defendant to the judgment creditors and the dominant purpose of the plaintiff must be to make the defendant a bankrupt. In my view, a purpose is not improper unless it involves a demand made without right, or unless it entails a consequence unrelated to or not proportionate with the right, interest or wrong asserted in the proceedings or by the process said to have been abused (see *Williams v. Spautz* [1992] 174 CLR 509). Considering the facts of the case apropos to the law as stated, the defendants commenced bankruptcy proceedings for a sum not exceeding half of the amount that was owed by the 1st defendant to the plaintiff. In my view there was no proper commercial purpose to be served by seeking the plaintiff's bankruptcy and the distribution of his assets. Consequently the bankruptcy proceedings were an abuse of process commenced and maintained to effect an object not within the scope of the process and causing the plaintiff damages. When process is abused, the unfairness against which a litigant is entitled to protection, is his subjection to process, which is not intended to serve, or which is not capable of serving its true purpose. In continuing with bankruptcy proceedings, the defendants acted unlawfully, negligently, unconscionably with conscious wrongdoing in contumelious disregard for the plaintiff's rights.

Damages

For Civil Malicious Prosecution

General

The plaintiff is an advocate and solicitor of 25 years' standing. The damages to the plaintiff's reputation with regard to his professional status is that:

(a) The plaintiff did not pay what was owing on a credit card.

(b) The plaintiff could not even pay such a small sum of RM7,519.44.

(c) A bankruptcy notice was issued against him.

(d) He evaded service of the bankruptcy notice.

(e) He committed an act of bankruptcy.

(f) He is unable to pay his debts.

(g) A creditor's petition was taken out against him.

(h) He evaded service of the creditor's petition.

(i) The creditor's petition against him was required to be published in a national newspaper.

(j) The plaintiff may be removed from the roll of advocates and solicitors.

(k) Prospective clients including banks and financial institutions would never engage him.

(l) He cannot be trusted with any money.

(m) His practice as an advocate and solicitor is in jeopardy.

(n) The plaintiff's name appears in the data bank of a credit check company, namely, CTOS Sdn Bhd, and that a creditor's petition has been taken out against him.

(o) The plaintiff's name as such would also appear in the data banks of other credit check companies.

(p) He can never obtain a loan or similar facility from any bank or financial institution.

The damage to the plaintiff's reputation with regard to his social status is that:

(i) The stigma of having a creditor's petition taken out against him will forever remain.

(ii) There will always be the likelihood that he will suffer the same humiliation as happened when Maybank refused to open an account for him.

(iii) He will never be nominated or elected to any official position in any club or social body.

(iv) His colleagues in the legal profession will shun him.

(v) His wife and members of his family will forever suffer the same humiliation.

Having considered all these factors, I award a sum of RM200,000 as general damages against both the defendants.

Aggravated

Every action and step taken by the defendants from the very beginning was dishonest, malicious and totally reckless. The aggravated damage to the plaintiff arises out of:

(a) the refusal of the defendants to reply to his letters and telephone calls for several years;

(b) the defendants proceeding with every step including obtaining default judgment, instituting bankruptcy proceedings and continuing with bankruptcy proceedings in stealth;

(c) the use of bankruptcy proceedings against the plaintiff especially so knowing that he is a practising advocate and solicitor;

(d) prosecuting the plaintiff in the several applications made in the bankruptcy court and in the bankruptcy proceedings;

(e) continuing to adamantly maintain and justify the obviously untenable defences; and

(f) not apologising for their conduct.

Under this head I award the plaintiff the sum of RM100,000 against both the defendants. I do not think that this is a fit and proper case to consider awarding exemplary damages as has been urged upon me.

For Abuse of Process

Under this head, I award a sum of RM100,000 against both the defendants.

All the awards will bear interest at 4% per annum from the date of the issuance of the bankruptcy notice to date of judgment and costs.